

NAL/Acct. 415HF0010

Commission prior to marketing. 47 C.F.R. §15.101(a). Marketing includes importing, advertising, distributing, selling, and shipping. 47 U.S.C. §302(b); 47 C.F.R. §2.803. The NAL cited Ace for advertising and selling two different scanners without first obtaining an equipment authorization. No equipment authorization would have been granted because the scanners in question were capable of tuning into frequencies assigned to the cellular telephone service and therefore, contravene the prohibition against FCC authorization of this device contained in Section 15.121 of the rules, 47 C.F.R. § 15.121.

III. DISCUSSION

5. In its motion for summary judgment, Ace asserts that the NAL must be dismissed or withdrawn because the NAL amount was calculated using Commission's Policy Statement, Standards for Assessing Forfeitures, (Policy Statement), 8 FCC Rcd 6215 (1993), which was vacated by the U. S. Court of Appeals for the District of Columbia Circuit, USTA v. FCC, 28 F. 3d 1232 (D.C. Cir. 1994). We disagree. The Policy Statement was a guideline for determining the amount of the proposed forfeiture, and had no bearing on the Bureau's determination that Ace was liable for a monetary forfeiture. On reconsideration, the Bureau has reassessed the amount pursuant to the statutory factors set forth in Section 503 of the Communications Act, 47 U.S.C. § 503(b)(2)(D). Section 503(b)(2)(D) requires that, the Commission or its designee, in determining the amount of a forfeiture, "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. § 503(b)(2)(D). We now apply these factors to the facts in this case, and address petitioner's remaining arguments.

6. Ace does not dispute that the two types of scanners, the Yupiteru Model MVT 7100 and the Trident Model TR 2400, were required to have equipment authorizations (certification) issued by the Commission, as required by Section 15.101(a) of the Commission's rules. Ace contends, however, that the NAL should be reduced or dismissed because Ace demonstrated a good faith attempt to comply with the Commission's rules. In this regard, Ace argues that its efforts at implementing its compliance plan were hampered by its having to stop third parties from importing its equipment. Ace's arguments do not address the lack of certification. The NAL stated that Ace advertised the Yupiteru Model MVT 7100 scanner in three amateur radio publications in September and October of 1993 and sold a unit to an individual in August 1993. For the Trident Model TR 2400 receiver, Ace sold two units to individuals in March and April of 1994. These scanners, which were examined by Commission staff and found to be noncompliant with the rules, were purchased from or provided by Ace itself and not any other entity. Moreover, we note that Ace advertised the scanners in question in nationally distributed magazines catering to persons interested in receiving radio communications. In these circumstances, we disagree that Ace made good faith efforts to comply with the rules. We also reject Ace's claim that its efforts at compliance were thwarted by others and hold Ace fully responsible for the violations.

7. In its response to the NAL, Ace denies that it violated Section 302(b) of the Act and

Section 2.803 of the Commission's rules because it claims that those sections do not prohibit "marketing." We disagree. Section 2.803 of the rules is one of the Commission's rules under the heading "Subpart I - Marketing of Radiofrequency Devices," and it describes the type of activities that are prohibited absent the Commission's authorization for the device at issue. Specifically, Section 2.803 prohibits the selling or leasing or offering for sale or lease (including advertising for sale or lease) of a product without an equipment authorization if an equipment authorization is required. The Commission's record in this case establishes that Ace sold the equipment in question, that the equipment sold was required to have an equipment authorization issued by the Commission, and that the Commission would not have authorized the equipment. Copies of advertisements in widely distributed magazines confirm that the equipment was displayed for sale in print medium with nationwide circulation. Therefore, we reject Ace's contention that its actions were not proscribed by the Commission's rules.

8. Ace requests that the forfeiture penalty be reduced because it has been attempting to rectify its past mistakes by obtaining proper authorization for marketing and sales of radiofrequency equipment within the United States. Prompt corrective action to come into compliance with Commission rules or policy is expected, however, and does not nullify or mitigate any prior forfeitures or violations.¹ Ace also claims that it has already been penalized by the Commission in a March 29, 1994 letter for marketing one of the two scanner models. That letter, however, did not assess any penalty. It simply advised Ace that, because of its failure to bring its equipment into compliance with the Commission's rules, the processing of Ace's other applications for an equipment authorization was being delayed until such time as the Commission could determine whether a grant of authorization would serve the public interest. *See* 47 C.F.R. § 2.915(a)(2).

9. Ace claims that the Commission erred in sending it an official notice pursuant to Section 503(b)(5) of the Act because these provisions do not apply if the "person involved is engaging in activities for which a license, permit, certificate, or other authorization is required...". Inasmuch as Section 15.101 of the Commission's rules mandates equipment authorization prior to marketing, Ace contends that the provisions of Section 503(b)(5) do not apply, that the "Notice" given by the Commission was in error, and that the Commission should be precluded from using any response given by Ace as a result of the Commission's error. We wholly reject Ace's contention. Sending a Notice of Violation to Ace does not preclude the Commission from assessing a forfeiture based, in part, on information received in response to the Notice. Marketing an unauthorized device automatically subjected Ace to a potential monetary forfeiture for violating the Commission's rules. Rather than automatically assessing a forfeiture, the Commission, in its discretion, chose to warn Ace of the violation and afford it an opportunity to respond to the warning prior to making any decision regarding possible enforcement action. Thus, contrary to Ace's suggestion that it was somehow prejudiced by the official notice, the Commission's action gave Ace ample opportunity to demonstrate that further enforcement action was unnecessary.

¹ *See Station KGVJ, Inc.* 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

10. Ace has failed to provide any justification for the cancellation or reduction of the forfeiture. In accordance with Section 503(b)(2)(D), we have considered Ace's culpability. In this connection, we note the reference in the NAL to three different instances in which the Yupiteru Model MVT 7100 scanner was advertised. We further note Ace's total disregard for the Commission's warning that the marketing activities at issue were prohibited. Indeed, Ace proceeded to sell Trident Model TR 2400 to a company and to an individual subsequent to the Commission's warning. We have also considered the gravity of the violation. In particular, and as stated in the NAL, the Commission's records establish that the Trident Model TR 2400 scanner receiver at issue bore a label with an FCC identifier number. It therefore potentially misled the public into believing that the FCC had authorized the equipment, although the FCC does not issue equipment authorizations for this type of device. After considering the totality of circumstances in this case, we conclude that a forfeiture in the amount of \$20,000 is warranted.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), that Ace Communications **FORFEIT** to the United States the sum of twenty thousand dollars (\$20,000) for the willful and repeated violation of Section 302(b) of the Act and Section 2.803 of the Commission's rules.

12. **IT IS FURTHER ORDERED**, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that Ace Communications must pay the monetary forfeiture amount of \$20,000 within thirty (30) days of the date of release of this order. Payment may be made by check, credit card or money order payable to the Federal Communications Commission.² Please place NAL/Acct. 415HF0010 on the remittance and mail it to:

Federal Communications Commission
P. O. Box 73482
Chicago, IL 60673-7482

² Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules. Also, please contact Chief, Billings and Collections for more information on credit card payments.

13. **IT IS FURTHER ORDERED** that the Compliance and Information Bureau send by certified mail, return receipt requested, one copy of this Order to Ace Communications, 10707 E. 106th Street, Fishers, IN 46038, one copy to Ace Communications, 6975 Hillside Court, Indianapolis, IN 46250, and one copy to its counsel.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie R. Salas".

Magalie R. Salas
Chief, Compliance Division